

Honorable Judge Benjamin Settle

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

CLYDE RAY SPENCER,

Plaintiff,

v.

JAMES M. PETERS, et al.,

Defendants.

No. C11-5424BHS

PLAINTIFF'S RESPONSE TO  
DEFENDANT KRAUSE'S  
MOTION FOR  
RECONSIDERATION

NOTED ON MOTION  
CALENDAR:

Friday, September 27, 2013

In *Moldovan v. City of Warren*, 578 F.3d 351, 377-78, 381 (6th Cir. 2009), the Court held that because police officers play an integral role in ensuring that the state complies with *Brady*, a police officer can be held liable for suppressing exculpatory information. Krause seeks to avoid her *Brady* obligation by claiming she disclosed evidence to prosecutor Peters and it was then his duty to disclose the evidence to the defense.

**Undisputed Facts**

Krause admitted that when the Clark County Sheriff's Department ("CCSD") obtained evidence, the protocol required that the evidence be tagged, bagged, logged and entered into CCSD evidence with a written Utility Report accompanying the evidence. Declaration of Kathleen T. Zellner, Dated September 20, 2013 ("Sept. Zellner Dec."), Ex. A (excerpts from deposition of Sharon Krause) at 108. Krause has admitted that she did not follow the protocol. Instead, after the interview, she placed the videotape in her desk drawer. *Id.* at 103. Later, she removed the videotape from the CCSD and put the videotape in her garage. *Id.* at 95-96, 111. By placing the videotape in her desk and garage, Krause did not log it into evidence and she removed it from the evidence chain. She admitted she failed to create a report reflecting the

1 existence of the videotape as she was to do with all pieces of evidence. *Id.* at 109, 175. More  
2 importantly, the facts establish that Krause removed the videotape from CCSD not negligently,  
3 but deliberately. *Id.* at 96, 105-06.

4 Michael Davidson confirmed at his deposition that he did not instruct Krause to take the  
5 videotape to her home. Zellner Dec., Ex. C (excerpts from deposition of Michael Davidson) at  
6 79. He vehemently denied that he gave Krause permission to do so. *Id.* at 79. Davidson also  
7 testified that the CCSD's "normal course" would have been for Krause to "author" a report  
8 reflecting the interview. *Id.* at 81. Davidson admitted that there was no report reflecting the  
9 videotaped interview. *Id.* at 81-82. Nothing in the CCSD referenced the videotape's existence.  
10 *Id.* No confirmation of the existence of a successful taping of Kathryn's interview was ever  
11 communicated to the Clark County Prosecutor's Office (CCPO) during the disclosure of the  
12 discovery to the defense.

13 By Peters' own admission, Barb Linde of the King County Prosecutor's Office was the  
14 assigned prosecutor for about 3 1/2 months. Zellner Dec., Ex. B at 112, 145-47, 216-17. Peters  
15 "came back into the case" in the second or third week of April, 1985. *Id.* at 216. Peters only  
16 became involved and began thinking about trial in early May, 1985. *Id.*

17 Because there is absolutely no evidence that Barb Linde or any prosecutor from the  
18 King County Prosecutor's Office ever possessed, viewed, or even knew the videotape existed,  
19 any attempt by Krause to impute knowledge to them would obviously lack merit.

### 20 **Actual Knowledge**

21 Consistent with Krause's deceptive actions, there is no evidence Peters had actual  
22 knowledge of the videotape's existence. Peters testified he watched the videotape for the first  
23 time in October, 2012 and certainly did not view it prior to Krause's disclosure of it in 2009.  
24 *Id.* at 21. There is no evidence that Peters ever confirmed the videotape successfully recorded



1 the interview. Peters testified he was "shocked and surprised" when he learned the videotape  
2 existed. *Id.* at 236. When he spoke to Krause after she disclosed the videotape, he said nothing  
3 to suggest he was aware a videotape existed. Sept. Zellner Dec., Ex. A at 100-02.

#### 4 **Constructive Knowledge**

5 In order to establish a *Brady* violation based on constructive knowledge, the defendant  
6 must establish that: (1) the prosecution was put on notice either through specific defense  
7 requests for information or, under the circumstances, that exculpatory information may  
8 possibly exist; (2) once the prosecution is put on notice, it must take objectively reasonable  
9 steps to discover the potentially exculpatory information. Factors that should be considered  
10 include: (a) the location of the information; (b) the size and scope of the investigation it would  
11 take to uncover the information; and (c) the connection or relationship between the instant case  
12 and the proceeding in which the material is located. If the prosecution fails to take these  
13 objectively reasonable steps, constructive knowledge of any exculpatory information will be  
14 attributed to the prosecution. *United States v. Risha*, 445 F.3d 298, 309 (3d Cir. 2006)  
15 (Nygaard, J., dissenting).

16 Here, the prosecution and Peters did not have constructive knowledge of the videotape.  
17 As explained above, the videotape was located in Krause's desk and then her garage. It was  
18 never located in the CCSD's evidence files. No investigation of reasonable size and scope  
19 would have uncovered the videotape. The videotape was not located in a criminal file.  
20 Therefore, Krause has not established, and cannot establish, that Peters and the prosecution had  
21 actual or constructive knowledge of the videotape. As stated in *United States v. Geames*, 427  
22 F.3d 1333, 1337 n.2 (10th Cir. 2005), "where no record evidence supports any awareness by the  
23 local police or federal officers of the alleged suppressed evidence, we refrain from conjuring up  
24 its existence."

### Actual Possession

It is undisputed that neither Peters, nor Barb Linde, nor any other prosecutor had actual possession of the videotape. The videotape went from the camera, to Krause's desk, to Krause's garage. There is no evidence Peters ever observed it prior to October, 2012, or that he ever touched it. Zellner Dec., Ex. B at 21, 169-70, 174.

### Constructive Possession

Krause may argue that Peters constructively possessed the videotape. However, Krause hid the tape in her personal belongings and never told Peters the tape existed. There is no evidence the videotape was in a file accessible to Peters or the prosecution.

In *Holman v. Wilson*, 158 F.3d 177, 181 (3d Cir. 1998), the Court explained that the prosecution has a duty to search **accessible files** to find requested exculpatory material. (emphasis added); *see also United States v. Brooks*, 966 F.2d 1500, 1502-03 (D.C.Cir.1992); *Carey v. Duckworth*, 738 F.2d 875, 878 (7th Cir.1984); *United States v. Austen*, 632 F.2d 478, 481 (5th Cir.1980). As one court has noted, the duty rests on the notion that "government failure to turn over an **easily turned rock** is essentially as offensive as one based on government non-disclosure." *Brooks*, 966 F.2d at 1503 (emphasis added).

No reasonable search by Peters or the prosecution would have encompassed a search of Krause's desk drawer or her garage. A search of Krause's desk or garage would not be akin to an "easily turned rock." There must be a limit to how far the doctrine of constructive possession extends and it should not extend into an investigator's garage. Neither Peters nor any other prosecutor assigned to the case would have had any reason to believe Krause had hidden the videotape. Peters admitted at his deposition that he had never heard of original evidence being found in an investigator's garage. Sept. Zellner Dec., Ex. B at 240.



1 Krause admitted that there were two ways for evidence obtained by the CCSD to be  
2 disclosed to the prosecutor. One way was for a copy to be made and then provided to the  
3 prosecutor. Krause does not claim that was done in this case. As to the only other method of  
4 disclosure to the prosecutor, Krause testified:

5 [Question] When you prepare reports with regards to an investigation, how would  
those reports make their way to the prosecuting attorney?

6 [Answer] At times -- Everything has to go into our records at the sheriff's office.

7 Sept. Zellner Dec., Ex. D (excerpts from habeas deposition of Sharon Kruase) at 18. As it is  
8 undisputed that Krause did not place the videotape "into [the] records at the sheriff's office,"  
9 the only conclusion is that the videotape did not "make [its] way to the prosecuting attorney."

10 Peters' testimony at the habeas proceedings provides more evidence that he did not  
11 know the videotape existed. When the court inquired on the topic of videotaping interviews of  
12 suspected victims of sexual abuse, Peters did not reference the videotape of Kathryn's  
13 interview. Sept. Zellner Dec., Ex. E (excerpts from habeas hearing testimony of James Peters)  
14 at 337. The circumstances commanded that, had he known of the videotape's existence, he  
15 would have advised the habeas court.

16 The existence of a successfully recorded videotape of Kathryn's interview and Peters'  
17 participation in the interview are not equivalent. Peters admitted that viewing the videotape  
18 was crucial to interpreting its contents. Sept. Zellner Dec., Ex. B at 17. He explained that  
19 many of Kathryn's responses were inaudible and in order to properly convey what transpired  
20 and create a transcript "with integrity" the transcriber would need to view the tape. *Id.* Peters  
21 said "the tape speaks for itself." *Id.* at 53.

22 The conduct of the prosecutors when they learned of the videotape's existence  
23 establishes that no prosecutor knew the videotape existed until Krause disclosed it. Once  
24 Krause contacted Prosecutor Dennis Hunter, he requested that she immediately send the tape to

1 him. Sept. Zellner Dec., Ex. A at 100. Once Hunter received the tape, he immediately  
2 provided it to Art Curtis and Curtis watched it. Sept. Zellner Dec., Ex. F (excerpts from  
3 deposition of Arthur Curtis) at 48-49. After Curtis reviewed it, he immediately disclosed it to  
4 the defense. *Id.* at 49. There is no reason to believe that Peters, Linde, or any other prosecutor  
5 would have acted differently and withheld the videotape had Krause disclosed it prior to  
6 Plaintiff's plea.

7 Peters did not have a motive to hide the videotape, but Krause did. The videotape was  
8 not only *Brady* material in Plaintiff's criminal case, but it was evidence of Krause's  
9 wrongdoing. The videotape demonstrates that Krause's reports are fabricated because not only  
10 does Kathryn repeatedly deny she was abused on the videotape, she spoke and communicated  
11 completely differently than the way Krause represented she did in her reports. Kathryn also  
12 communicated completely differently on the videotape than she was alleged to have done as  
13 reflected in Shirley Spencer's letter. Krause's reports and that letter were the basis of the  
14 alleged probable cause in the case. Therefore, Krause had every reason to hide the videotape  
15 (as she undisputedly did) to cover up her conduct and cause Plaintiff's arrest and prosecution.

16 To impose a duty upon a prosecutor to ferret out a deliberate deception by a police  
17 officer would create an impossible and unprecedented burden upon him. Further, to condone a  
18 police officer's conduct in intentionally secreting away evidence to disguise her own  
19 wrongdoing would be unprecedented and contrary to the law permitting individuals such as  
20 Plaintiff from seeking redress for violations of his civil rights.

21 **Peters could not have known the exculpatory/impeaching value of the videotape**

22 Regardless of the standard applied, Krause's assertion that prosecutor Peters was aware  
23 of the exculpatory nature of the videotape merely because he was present when it was recorded  
24 misses the mark. Prosecutor Peters could not have reasonably understood the exculpatory



value of the videotape while conducting the interview. The truly exculpatory and impeaching nature of the video could only be fully appreciated by carefully and repeatedly reviewing Kathryn's statements and demeanor, and then comparing her statements and demeanor during the videotaped interview with the statements and demeanor represented by Krause in her reports. Such a thorough evaluation required possession of the videotape and a transcript. At the time of the interview (1) Peters did not have the reports with him as Kathryn was speaking, and (2) Krause's reports of her 1985 interviews with Kathryn, Matt Spencer, and Matt Hansen (all of which are impeached by the video) had not yet been conducted or submitted. Krause concealed the videotape from Peters and the other prosecutors prior to Plaintiff's guilty plea. It is well-established that a detective's duty "is simply to collect the evidence and to disclose all of it to the prosecutor," and it is the prosecutor "who then makes the discretionary legal judgment about its material exculpatory attributes." *Jean v. Collins*, 221 F.3d 656, 669 (4th Cir. 2000). By concealing the videotape, Krause deprived any and all prosecutors from making such a discretionary legal judgment and disclosure to Plaintiff.

**Medical reports are part of the cumulative effect of Krause's concealment**

Because Krause is liable for her non-disclosure of the videotape, Plaintiff should be permitted to argue Krause is liable for the cumulative effect of the non-disclosure of the videotape *and* the undisclosed medical reports.

RESPECTFULLY SUBMITTED this 20th day of September, 2013.

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DECLARATION OF SERVICE

I hereby certify that on September 20, 2013, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF System, which will send notification of such filing to the attorneys of record as follows:

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